

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

<p>John Doe and Jane Doe 1 through 20, John Doe and Jane Doe A through K, Doe 12 on behalf of Does H and K, minors, and Doe G on behalf of Doe I, minor,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>State of Nebraska, <i>et al.</i>,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: right;">No. <u>8:09CV-456</u></p> <p style="text-align: center;">BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO USE FICTITIOUS NAMES</p>
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Pursuant to NECivR 7.0.1(a)(1)(A), Plaintiffs, by and through their attorneys of record, hereby submit their Brief in Support of Motion for Leave to Use Fictitious Names, which was filed contemporaneously with the Complaint. Plaintiffs filed under the pseudonyms of John Doe and Jane Doe 1 through 20 and John Doe and Jane Doe A through K, including Doe 12 on behalf of Does H and K, minors, and Doe G on behalf of Doe I, also a minor, due to the sensitive issues that are integral to the subject matter of this case, and to protect the privacy of the innocent friends, family members and employers of the individuals that may be harmed. Plaintiffs request that the Court grant the instant Motion to ensure the anonymity of the Plaintiffs, their family members, and the minor parties.

“An action must be prosecuted in the name of the real party in interest.” Fed. R. Civ. P. 17(a)(1). “The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.” Fed. R. Civ. P. 17(a)(3). Admittedly, courts have disfavored the use of pseudonyms because the public has an interest in the openness

of the proceedings in its Courts. See Doe v. Blue Cross & Blue Shield United, 112 F.3d 869,872 (7th Cir. 1997); Doe v. Frank, 951 F.2d 320,323-24 (11th Cir. 1992).

Notwithstanding, federal courts do allow parties to use pseudonyms or fictitious names, but neither the Eighth Circuit nor Supreme Court has established a test by which to determine whether a plaintiff may proceed under a pseudonym. W.G.A. v. Priority Pharmacy, Inc., 184 F.R.D. 616, 617 (E.D. Mo. 1999). The Court has discretion to decide whether to permit a fictitious party name. Doe v. Hartz, 52 F.Supp.2d 1027, 1046 (N.D. Iowa 1999). Generally, there is no “hard and fast formula for ascertaining whether a party may sue anonymously....The decision requires a balancing of considerations calling for maintenance of a party’s privacy against the customary and constitutionally embedded presumption of openness in judicial proceedings.” Doe v. Stegnall, 653 F.2d 180, 186 (5th Cir. 1981). Courts are typically guided by a number of factors, including:

1. Whether the matter is one of a sensitive and highly personal nature, or involves information of the utmost intimacy;
2. Whether plaintiffs were suing to challenge governmental activity;
3. Whether plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution;
4. Whether the defending party would be prejudiced;
5. Whether the plaintiff would risk injury if his or her identity is disclosed;
6. Whether the interests of children are at stake; and
7. Whether there are less drastic means of protecting the legitimate interests of the parties.

See W.G.A., 184 F.R.D. at 617; Luckett v. Beaudet, 21 F.Supp. 2d 1029 (D. Minn. 1998); Doe v.

Goldman, 169 F.R.D. 138, 139 (D. Nev. 1996); Doe v. Stegnall, 653 F.2d at 185. In this case, all of the enumerated factors weigh in favor of permitting the Plaintiffs to proceed under these fictitious names.

First, Plaintiffs' complaint raises issues of a sensitive and highly personal nature and requires Plaintiffs to disclose information of the utmost intimacy as this case relates to their past convictions for sexual offenses. (Exhibits 1-20). Although these convictions are matters of public record, sex offender registration sheds new light on convictions that, in some instances, occurred over a decade ago. Associating the Plaintiffs with sexual misconduct, even remote misconduct, is understandably a sensitive and intimate topic that will result in embarrassment and humiliation for those convicted and their families and friends at a time when some Plaintiffs and their families are expecting that this part of their lives is already behind them, or would be behind them soon.

The underlying suit involves a constitutional challenge to LB 97 and LB 285 which modified the prior version of the Nebraska Sex Offender Registration Act and together constitute the "New Act." If allowed to be enforced, the New Act will require the publication and dissemination of personal information for some Plaintiffs not already on the State Patrol website and others associated with these Plaintiffs that heretofore has not been publically accessible (Exhibit 1, 2, 3, 4, 7, 9-14, 16-19 and 21-31). Additionally, LB 97 and LB 285 require Plaintiffs to subject themselves to this scrutiny and community notification for a number of years into the future that was not previously contemplated by the Plaintiffs.

Second, Plaintiffs challenge governmental activity only, and do not seek recourse or recovery against a private party. There will be no damage to the "reputation" of the Defendants,

as would be the case if the Defendants were private individuals. See Southern Methodist University Association v. Wynne & Gaffe, 599 F.2d 707, 713 (5th Cir. 1979).

Third, plaintiffs may be compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution. A provision of the New Act requires each registrant to sign a consent form, giving law enforcement the right to seize and search all computer and electronic communication devices within their “possession.” This consent also includes permission from the registrant to install monitoring software to monitor Internet usage. Refusal to provide this consent constitutes a violation of the New Act, punishable as a Class IV felony (first offense) or a Class III felony (second and subsequent offenses). All Plaintiffs challenge the legitimacy of this coerced consent and resultant search and seizure, in violation of their right to be free from unlawful searches and seizures. (Exhibits 1-31). They challenge the “end-run” approach to a warrant through consent that was coerced and compelled under pain of criminal prosecution. This is one of many constitutional bases for the present action, but while this challenge is pending before the Court, one or more Plaintiffs may choose to refuse to give consent. By disclosing their identities through this lawsuit, these Plaintiffs have placed a bulls eye on themselves and will undergo additional scrutiny from law enforcement to ensure their compliance with the New Act even during the pendency of this case. The Plaintiffs should remain free from facing additional scrutiny and sanctions as a result.

Fourth, the defending parties will not be prejudiced. With the exception of standing, the only issues before this Court are issues of law, not issues of fact. The individual circumstances of the Plaintiffs can be determined away from the public eye, but the Court’s determination as to the constitutionality of the Act at issue can remain public. It is that decision with regard to the

constitutionality of the Act that impacts the public. Similarly, the Defendants are able to advocate as effectively for the constitutionality of the New Act with or without Plaintiffs' real identities. Finally, the damage to the Defendants' reputation is not a concern since the challenge relates to governmental activity only, and the action will not affect the "good names" of any individual or private litigants. See Southern Methodist University, 599 F.2d at 713.

Fifth, Plaintiffs and their families risk injury if their identities are disclosed. One Plaintiff has already suffered physical attack on his family home. (Exhibits 1). The risk of further attacks will only increase upon the filing of this action and the added publicity that will accompany it (Exhibit 35 and 38). Plaintiffs have expressed serious concerns for the safety and wellbeing of themselves and their families (Exhibits 1 through 31). The fact that the Plaintiffs and their families challenge enforcement of the Act will likely inflame public sentiment against them.

Sixth, the interests of Plaintiffs' children are at stake. The Plaintiffs' children will likely be subjected to severe ridicule and prejudice at the hands of peers and others at school or in their communities because their parent is associated with this case. There is an increased risk of physical reprisal against the adult Plaintiffs, and their children, as well as the minor Plaintiffs that are parties in this suit (Exhibits 29, 29 and 31).

Seventh, there are no less drastic means of protecting the legitimate interests of the parties. Disclosure of the Plaintiffs' identities constitutes a *de facto* public notification under the sex offender registry. This will effectively moot the Plaintiffs' argument that it is a violation of Due Process to brand an individual as a sex offender when that the individual has a low likelihood to recidivate. Conducting the action under seal would be a more drastic means of

protecting the parties' interests because such an action would categorically deny the public access to the proceedings. However, by permitting the Plaintiffs to proceed under a fictitious name, the public will have access to the issues that impact the public, namely, the constitutionality of the New Act, while at the same time shielding the Plaintiffs from public scrutiny and its commensurate injuries.

Plaintiffs assert that they will suffer extreme psychological harm, embarrassment, humiliation and emotional distress resulting from their association with this lawsuit. Plaintiffs desire that their identities and status as litigants challenging the Nebraska Sex Offender Registration Act remain private. Plaintiffs request falls squarely within the reasoning that other courts have employed to permit the use of a fictitious name. For these reasons, Plaintiffs request that the Motion to use Fictitious Names be granted.

DATED: December 16, 2009.

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Doe 12 on behalf of Does H and K, minors, and
Doe G on behalf of Doe I, minor,

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